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IN THE

SUPREME COURT OF THE UNITED STATES

No. 81-6353

HERBERT RUSSELL BASSETT,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Virginia is not yet reported. Petitioner states that jurisdiction is founded upon 28 U.S.C. § 1257(3).

ISSUES PRESENTED

I. SHOULD CERTIORARI BE GRANTED?

A. WAS PETITIONER EFFECTIVELY DENIED THE RIGHT TO CROSS-EXAMINATION?

B. WAS THE INSTRUCTION GIVEN THE JURY RELATIVE TO THE DEFENSE OF ALIBI UNCONSTITUTIONAL?

C. WAS PETITIONER DENIED THE RIGHT TO REPRESENT HIMSELF?

D. DID FAILURE TO GIVE AN INSTRUCTION DEFINING REASONABLE DOUBT IN THE SENTENCING STAGE OF THE TRIAL VIOLATE ANY CONSTITUTIONAL RIGHT?

E. WAS PETITIONER UNCONSTITUTIONALLY DENIED THE RIGHT TO ALLOCUTION?

I. CERTIORARI SHOULD NOT BE GRANTED.

Although this Court has broad statutory authority to review petitions for a writ of certiorari, a petition will be granted only where there are special and important reasons therefor. Rule 19, Rules of the Supreme Court of the United States; Ex Parte Woods, 143 U.S. 202 (1892); Rice v. Sioux City Memorial Park Cemetery, Inc., et al., 349 U.S. 70 (1954).

A review of the issues Petitioner raises reveals that the granting of certiorari in the instant case would be inappropriate. These issues are hereinafter discussed.

A. PETITIONER WAS NOT EFFECTIVELY DENIED THE RIGHT OF CROSS-EXAMINATION.

Petitioner asserts that he was denied the right to cross-examine a witness presented on behalf of the Commonwealth, Samuel Cook. Petitioner has asserted that "[t]his line of questioning would have permitted counsel to argue to the jury that the witness had an interest in testifying against the defendant because of the possibility of leniency should his testimony assist in a conviction."

Petitioner, however, did elicit before the jury that Cook had been charged originally with capital murder in the case, that he was no longer charged with that crime, and that his case originally set for trial on July 30, prior to Petitioner's trial had been continued. The Trial Court then directed that further testimony be given outside the presence of the jury.

Out of the presence of the jury, Cook was asked if he knew why his case had been continued, and he replied that his lawyer had told them that it would be best "if I can back off." Cook was then allowed to confer with his attorney. After doing so, Cook's attorney told the Trial Court that he had advised his client that he did not have to answer the question but that Cook wanted to answer it.

Cook, again before the jury, was asked whether his case had been continued, and he replied that it had been continued because his lawyer had told him that "it would be best that I do."

Even if Petitioner's cross-examination did not create a potential for invasion into the attorney-client privilege,[1] Petitioner presents no real and substantial Constitutional issue. A defendant has a Constitutional right to cross-examine the prosecution's witnesses. Pointer v. Texas, 380 U.S. 400 (1965); Davis v. Alaska, 415 U.S. 308 (1974). However, Petitioner was not effectively denied that right.

Answers given by Cook remained the same both before and after consultation with his attorney, and any error on the part of the Trial Court in allowing him to confer with his attorney was harmless beyond a reasonable doubt. Chapman v. California, 38 U.S. 18 (1967).

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[1] It is clear that it did create such a potential. Involved was direct conversation between Cook and his attorney.

B. THE INSTRUCTION GIVEN THE JURY RELATIVE TO THE DEFENSE OF ALIBI WAS NOT UNCONSTITUTIONAL.

Petitioner complains of the Trial Court's granting the following instruction:

> "The defendant relies upon the defense that he was not present at the time and place the alleged offense was committed. If, after consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time and place the alleged offense was committed, you shall find him not guilty."

He asserts that this instruction, standing alone, was confusing and should have been supplemented by a defining instruction.

It is true that the burden was upon the Commonwealth to prove beyond a reasonable doubt the elements of the crime charged. See, In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975). His assertion, however, that this instruction is violative of that principle is not well-founded.

An objective reading of the instruction simply does not support the assertion of Petitioner. The instruction simply told the jury that the Petitioner relied upon the defense of alibi and that if, after considering all the evidence, it had a reasonable doubt that he was present it must find him not guilty. Nothing in the instruction could have led the jury to believe that it must find beyond a reasonable doubt that the Petitioner was not present at the

time and place alleged. Moreover, the jury was instructed in other Instructions that the Petitioner was presumed innocent, that this presumption remained with him throughout the trial, and that it could not find him guilty unless the Commonwealth proved each and every element beyond a reasonable doubt.

There is no requirement that a Trial Court give an instruction relating to the quantum of proof necessary to sustain the defense of alibi, at least where the jury has not been instructed that the burden is on the defendant to prove that defense.

Defendants' attack upon the instruction appears to be more apparent than real and raises no Constitutional issue of any moment.

C. PETITIONER WAS NOT DENIED THE RIGHT TO REPRESENT HIMSELF.

Petitioner, after being represented by counsel appointed for him, there being two in number, throughout the trial, demanded that he have the right to make closing argument to the jury. The Trial Court overruled Petitioner's demand, and it is this action of the Trial Court of which Petitioner now complains.

There is no question but that a defendant is entitled to represent himself if he so desires. Faretta v. California, 422 U.S. 806 (1975).

The Trial Court's ruling was based upon the fact that from its inception the trial had proceeded on the basis that Petitioner was being represented by both counsel, in accord with his own desires, and that the Petitioner had no absolute right to dismiss his counsel and conduct his own defense once the trial had commenced.[1]

The Trial Court's ruling was not without foundation. United States v. Dunlap, 577 F.2d 867 (4th Cir. 1978), cert. den. 439 U.S. 858 (1979); United States v. Lawrence, 605 F.2d 1321 (4th Cir. 1979); United States v. Sacco, 571 F.2d 791 (4th Cir. 1978), cert. den. 435 U.S. 999 (1978).

Action by the Trial Court was within its sound discretion, and in that context violated no Constitutional right of the Petitioner.

D. FAILURE TO GIVE AN INSTRUCTION DEFINING REASONABLE DOUBT IN THE SENTENCING STAGE OF THE TRIAL VIOLATED NO CONSTITUTIONAL RIGHT.

Citing Gregg v. Georgia, 428 U.S. 153 (1976), and Gardner v. Florida, 430 U.S. 349 (1977), for the proposition that death as a punishment is unique and irrevocable, Petitioner argues that the Trial Court should have given an instruction defining reasonable doubt at the sentencing stage of the trial.

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[1] It is to be noted that Petitioner made his demand over the objection of both his counsel.

His complaint is without merit. The Trial Court gave at the guilt or innocence portion of the trial an instruction defining reasonable doubt for the jury, and there is no Constitutional mandate that an instruction be given in the same case twice, even if there be two stages to the proceeding.

E. PETITIONER WAS NOT UNCONSTITUTIONALLY DENIED THE RIGHT TO ALLOCUTION.

Petitioner asserts that he was unconstitutionally denied the right to allocution before the jury. In Virginia, there is no statutory right to allocution before a jury. There is no Constitutional right to allocution at all, it has been so held. Hill v. United States, 368 U.S. 424 (1962).

Petitioner claims that there is a denial of equal protection because if a defendant does not elect to be tried by a jury he may plead to the Court before the Trial Judge decides the issue of guilt, whereas if he selects a jury he may not plead to the jury.

The fallacy in this is that in either case a defendant may state whatever he likes through his attorney in closing argument before the issue of guilt is determined, no matter who the trier of fact is. And in cases tried before a jury or the Court, a defendant has the right of allocution prior to the time that the Trial Judge pronounces the sentence. Section 19.2-298, Code of Virginia (1950), as amended.[1]

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[1] This provides that the Trial Court shall inquire of the accused if he desires to make a statement before sentence is pronounced.

In capital trials before judges, a defendant may plead for mitigation before the judge determines punishment. Section 19.2-298, supra. In a jury trial, allocution is deferred until the jury has decided the sentence. However, § 19.2-264.4(B) permits a defendant to present evidence in mitigation during the trial's sentencing stage and through his attorney he may address the fact-finder in closing arguments. He still maintains the right to allocution before the judge pronounces the sentence.

Petitioner's argument ignores the fact that allocution occurs in every case, whether tried by a judge or jury. Allocution is not a Constitutional right in any event. He presents a poor case to make his argument in view of the fact that in his case an objective reading of the record clearly reveals that Petitioner was fully able to present mitigating arguments before the fact-finder.

CONCLUSION

For the foregoing reasons the Respondent respectfully submits that this Honorable Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Linwood T. Wells, Jr., Assistant Attorney General of Virginia, am a member of the bar of the Supreme Court of the United States, and on March 26, 1982, I mailed a true copy of this Respondent's Brief in Opposition to Granting of Certiorari to Robert P. Geary, Esquire, Geary & Davenport, 2026 East Main Street, Richmond, Virginia 23223, Counsel for Petitioner.

Linwood T. Wells, Jr.
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